NO. 82-937

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CONSOLIDATED SERVICE CORPORATION,
WATTS DETECTIVE AGENCY
AND
CHRISTOPHER P. RECKLITIS,

PETITIONERS

V.

ROBERT ROBINSON, TRUSTEE IN BANKRUPTCY
OF D. C. SULLIVAN & CO., INC.,

RESPONDENT

RESPONDENT'S CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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I

QUESTION PRESENTED FOR REVIEW

1. Is the potential impact of the lower court's denial of prejudgment interest too far-reaching to let stand, when it is in conflict with every other relevant opinion of this Court and the other Circuits and state courts and commentators and effects every prospective common law case in which the value of property is proven by opinion evidence?[1]

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[1] Should certiorari be granted, the trustee herewith specifies and reserves an alternative argument on the merits which he would then proffer, which would also secure the prejudgment interest sought. The trustee does not rely on it as a reason to grant the writ.

In the Appeals Court the trustee moved to amend his complaint, in accordance with Rule 15(b) of the Federal Rules of Civil Procedure, to add a fourth count, alleging that the same acts of the defendants which constituted a "fraudulent transfer" under the Bankruptcy Act also constituted a violation of the Massachusetts enactment of the Uniform Fraudulent Conveyance Law, Massachusetts General Laws c. 109A, §4. The prohibitory language of both statutes is almost identical. The very same trial evidence would have been adduced. The only change wrought by the amendment would have been the

II

LIST OF THE PARTIES

In addition to the parties listed in the caption hereof, in the proceeding below Daniel C. Sullivan and Billy R. Otte were also individual defendants against whom judgment was entered, but they have not petitioned for review.

(Footnote 1 continued)

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legal consequences of the evidence, sufficient to satisfy the standard for pendent jurisdiction, and at no substantive prejudice to the defendants. Under the Massachusetts decisions interpreting the Uniform Fraudulent Conveyance Law, prejudgment interest is uniformly awarded by the court to whatever jury verdict is returned for a fraudulent transfer. Were the amendment allowed, therefore, the court below could have awarded the prejudgment interest without having to determine if the damages were "ascertainable" under federal common law. The court, however, denied the motion to amend, ruling that it would unduly derogate the defendant's rights to trial by jury. The trustee would argue that was error.

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The Respondent, Robert Robinson, Trustee in bankruptcy of D. C. Sullivan & Co., Inc., as petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals For The First Circuit entered in this proceeding on July 19, 1982.

OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit is officially reported at 685 F.2d 729 (1st Cir. 1982), and is set out at pages A-1 through A-25 of the petitioners' Appendix to their Petition For Certiorari herein. The District Court's separate opinion denying prejudgment interest (the only issue raised by this petition), dated September 10, 1980, was not officially reported, but it is set out in full in the Appendix hereto, pages A-1 through A-17, infra. Also relevant is the unreported Order of the court below, dated September 14, 1982, denying this petitioner's petition for rehearing, and it is also set out in full herein, pages A-18 through A-20, infra.

JURISDICTION

The jurisdiction of this Court is as correctly specified in petitioners' petition for certiorari herein, with the additional facts that a stay of mandate was duly entered in the lower court conditioned upon petitioner herein filing their petition for certiorari on or before November 4, 1982, which they did, and this respondent's cross-petition is duly filed within 30 days of his receipt of a copy of petitioners' petition on November 3, 1982, as is provided in Rules 19.5 and 21.1(e)(iii) of the Rules of this Court.

STATEMENT OF THE CASE

Some material facts in addition to those set out in petitioners' petition for certiorari herein are necessary to permit the Court to consider the very separate question presented herein.

The trustee's complaint "included in his prayer for relief a demand for interest" (A-4).[2] No request for a jury instruction on interest was made by any party, and no instruction thereon was given (A-4). The trustee moved to alter or amend judgment, pursuant to Rule 59 (e) of the Federal Rules of Civil Procedure, to have the appropriate ten years' of prejudgment interest added to the $750,000 jury verdict (A-2-A-3). In an Order And Memorandum Of Decision, dated September 10, 1980, the District Court denied the motion and the prejudgment interest on the ground that the evidence of the value of the property transferred did not prove the damages to be "ascertainable with reasonable certainty." (A-1-A-17)

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[2]The pages to the Appendix to this cross-petition are cited herein as "A-__". and the pages to the Appendix to the petitioners' petition are cited herein as "R. A-___."

The trustee duly cross-appealed the error of not adding the approximately $530,000 of prejudgment interest due, and the court below "agree[d]" with the District Court's "conclusion" that prejudgment interest was not allowable (R. A-21 - R. A-24). The trustee petitioned for rehearing on the issue, as the lower court's opinion appeared to misunderstand an opinion of this Court upon which it had relied and the evidence at trial, but that petition was denied by an Order Of Court, dated September 14, 1982 (A-18-A-20).

At trial the only evidence of the fair market value of the corporate property fraudulently transferred--essentially, the D. C. Sullivan & Co., Inc. customers and the security guards and supervisors to service them--were the persuasive opinion-admissions of

the defendants, D. C. Sullivan and Billy R. Otte, the two most senior and knowledgeable officers of the company. The president chief financial officer, and principal stockholder, Daniel C. Sullivan, called as a witness by the trustee, testified that even considering the company's very serious financial condition, and knowing that the Internal Revenue Service was going to levy on the accounts receivable the next morning, the fair market value of the organization, the transferrable business opportunity of uninterruptably servicing their "gold plated" customer accounts, was nonetheless worth "one million dollars" as of that point in time when Recklitis took that valuable business opportunity for nothing. Sullivan detailed the multi-faceted factual basis he had for that opinion. Its admissibility was stoutly contested by the respondents here at trial and in the court below. Billy R. Otte, also an individual

defendant called as a witness by the trustee, was the vice president, a stockholder, and the vital operating officer, hired by Recklitis as the sine qua non to effectuate the transfer and uninterrupted servicing of the customer accounts, and he concurred with Sullivan's "million dollars" opinion -- exact, unqualified, substantiated, and persuasive--unshaken on "severe attack on cross-examination" (R. A-18). The court below also took note of the practical fact "that as parties-defendants, Otte's and Sullivan's testimony as to the value of the business before its takeover was against their own interests...." (R. A-20).

Equally persuasive evidence of value was the fact that the defendant Recklitis, also called as a witness by the trustee--an experienced corporate entrepreneur--never said a word to contradict his co-

defendants' opinion of the value of the property transferred to him, nor did he question the validity of the principal method of establishing the fair market value of a service company like D. C. Sullivan & Co., Inc. Recklitis had even purchased an almost identically sized competing security guard business, also operating in Boston (the defendant, Watts Detective Agency, Inc.), only two months before this takeover, but all the records to establish its cost and valuation (which could have, dispositively, either corroborated or disproven the validity of Sullivan's method of establishing corporate value) Recklitis said had mysteriously disappeared. The trustee's formal notice to produce them was not complied with. As additional corroborative evidence that the corporate property transferred was worth "one million dollars",

the trustee proved that in the one year after Recklitis took over servicing the Sullivan customers, and after being able to retain only about three quarters of them as his accounts, Recklitis had gross sales from those accounts of $680,000 (R. A-15).

> "...He [Sullivan] relied in part for this opinion [that his business was worth one million dollars] on his understanding that service businesses which as his are valued at one dollar for each dollar of annual gross sales. Because Sullivan Company had accounts worth [, had had approximate annual gross sales of,] one million dollars as of April, 1970, this was the figure he used." (R. A-16)

Using "the gross sales valuation formula" (R. A-17), Watts' $680,000 gross sales for the year following the takeover corroborates to an extent the "one million dollars" evidence of value at the time of the takeover, as Watts managed to retain only thirteen of the seventeen Sullivan Company customers.

In accordance with Rules 19.5 and 21.1(i) of this Court, "the basis for federal jurisdiction in the court of first instance" is stated to be 28 U.S.C. §1331(a), for Counts I and II, alleging fraudulent conveyances under the then effective provisions of 11 U.S.C. §§107(d)(2)(a) and (d), the property having a value of one million dollars, and for Count III, alleging breaches of fiduciary duties and participation therein, arising from the same acts, under Massachusetts law, the court's pendent jurisdiction was invoked.

REASONS FOR THE ALLOWANCE OF THE WRIT

The parties and both lower courts agreed that since the Bankruptcy Act was totally silent on the matter of prejudgment interest, federal common law governed its award in this case, and that the applicable

general rule was that if the damages were "ascertainable with reasonable certainty" the trustee was entitled to prejudgment interest (it also being agreed that the damages here were not "liquidated", the easier kind of damages mandating prejudgment interest). In holding that the damages in this case were not "ascertainable with reasonable certainty" the court below has established a unique and totally aberrational federal precedent in conflict with every applicable opinion of this Court, with decisions of every other federal court of appeals, and with state courts of last resort and the leading commentators. Involving, as it does, a common law rule generally applicable to <u>any</u> case involving unliquidated property damages (this case just happened to arise in a Bankruptcy Act context), the importance of the question can hardly be

gainsaid. The question of when prejudgment interest is mandated on unliquidated property damages in common law contexts arises daily in the courts. Substantial sums of money and the issue of just compensation to a broad spectrum of citizens is involved. Unless this aberrational decision is reversed, its potential impact, its capacity to spawn real mischief and confusion, is broad-ranging indeed. The scope of the decision is too catholic, the court too prestigious, to think that only this petitioner will be hurt by the decision. This petition quite accurately and literally presents a "shopping list" of the "Considerations Governing Review On Certiorari" for a federal case, as they are set out in Rule 17 of the Rules of this Court. Importantly, also, is the fact that there is no factual dispute to fuzzy the focus.

Assuming that the ramifications of the subject decision are patent, before demonstrating that it is as broadly aberrational as is specified above, it would seem responsible to assure the Court that the lower court's subject holding is as it is represented to be--that petitioner's advocacy is not painting the holding with too broad a brush. Fundamentally, of course, as a federal bankruptcy trustee, this petitioner has a sworn duty as an appointed federal court officer, shorn of the venal self-interest which too-often clouds the judgment of private litigants. Petitioner's advocacy should equate (and properly be held) to a United States Attorney's.[3]

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[3]Hopefully, the trustee may also expect to share the markedly high success ratio on petitions for certiorari enjoyed by the government. D. Provine, Case Selection in the United States Supreme Court, 1980, ps. 74-103.

Only two and a half pages of the opinion below directly relate to the holding in issue here (R. A-22-A-24), so the Court can quickly confirm the trustee's characterization. The court correctly cited two of this Court's opinions and two of its own to rule that when, as here, neither the Bankruptcy Act nor a general federal statute specifies when prejudgment interest is allowed, "we turn to federal common law for guidance" (R. A-22). Further proof that the court recognized that the applicable rule sought and applied was the general "federal common law"--not a specialized bankruptcy rule--is the fact that the four cases cited as governing involved an Agricultural Act penalty,[4] an Internal

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[4] Rodgers v. United States, 332 U.S. 371 (1947).

Revenue action against a surety bond[5], a federal civil rights case,[6] and an admiralty case.[7] The correct "federal common law" rule then found to be applicable (whether the damages were "reasonably ascertainable") was then exemplified by an opinion of this Court,[8] involving the conversion of timberland, a Second Circuit bankruptcy case,[9] which the lower court denominated as "the leading case" (R. A-22), and two treatises on damages[10] (R. A-22-A-23). Patently,

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[5] Royal Indemnity Co. v. United States, 313 U.S. 289 (1941).

[6] Furtado v. Bishop, 604 F.2d 80 (1st Cir. 1979), cert. denied, 444 U.S. 1035 (1980).

[7] Moore-McCormack Lines v. Amirault, 202 F.2d 893 (1953).

[8] Jones v. United States, 258 U.S. 40 (1922).

[9] Roth v. Fabrikant Bros., 175 F.2d 665 (2d Cir. 1949).

[10] Sedgwick, Damages, 9th ed. 1912, §300; Dobbs, Law Of Remedies (1973), §3.5.

the court correctly recognized that it was not effectuating a special bankruptcy rule as to when prejudgment interest was due, but the generally applicable common law rule mandating prejudgment interest when the property damages are "ascertainable with reasonable certainty." Petitioner's characterization of the breadth of the lower court's opinion is accurate.

The court below then held that the proven damages in this case--"the value of...the operating portion of Sullivan Company" -- "were not ascertainable" (R. A-23). The court so determined because the damages were not "liquidated" (petitioner admits that is so), "the parties did not and do not agree on the value of what was transferred" (query,

if there was not, in effect, "agree[ment]"[11]), and because the court found that "[t]he evidence as to the value of the transferred property ranged from one million dollars to the $680,000 figure representing Watts' gross receipts...for the year following the takeover....leaving the jury without the guidance of an established, recognized standard of prices" (R. A-24-A-25).

In his petition for rehearing, the trustee submitted to the court below the relevant pages of the Record (then so denominated) in this Court in Jones v. United States, 258 U.S. 40 (1922), which the court had correctly recognized as the dispositive authority (wherein "the value

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[11]The defendant, Otte, specifically "agree[d]" with the defendant, Sullivan's, quite specific opinion evidence that the property was worth exactly "one million dollars", the defendant, Recklitis, said not a word to contradict that opinion, and the plaintiff accepted their unanimous valuations by not introducting any other evidence of value--an expert, say, to testify their opinions were too low.

of the land was made ascertainable by the testimony of timber experts as to the current market value" [R. A-23]), and that Record demonstrated that in Jones there was a "range" of expert opinion of the value of the land of at least two and a half, or even three and a half, times the lowest opinion of value[12], yet this Court had held that even though the evidence of the value of the property "ranged" as broadly as it did, the property nonetheless had an "ascertainable value", and therefore there was "the same reason for allowing [pre-judgment] interest as if there had been a misappropriation of money." Id. at 49. The trustee argued in his petition for re-hearing that the "range" of opinion evidence in Jones, held to require the addition of

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[12]Those relevant pages of the Jones record are set out in the Appendix hereto, pages A-21-A-26, infra.

prejudgment interest, made the award of prejudgment interest in this case a fortiori. The trustee also argued that unless the lower court's opinion were modified to allow prejudgment interest, it would also conflict with the consistent panoply of federal cases awarding such interest, even though there was a "range" of opinion evidence of property values. Cited specifically by the trustee were an exemplary collection of federal condemnation or eminent domain cases, particularly selected from the, literally, hundreds reported[13] because the opinions well

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[13] Most of the statutory applications of federal condemnation and eminent domain power are cited in the Reporter's Notes to Rule 71A of the Federal Rules of Civil Procedure, and the cases are collected under those particular sections in the United States Code Annotated.

explicate the evidentiary facts[14], and other federal cases applying the common law rule to various kinds of property damages, wherein there was an evidentiary "range" of values, but prejudgment interest was awarded nonetheless, because the damages were sufficiently "ascertainable": Jackson v. Star Sprinkler Corp., 575 F.2d 1223 (8th Cir. 1978) (corporate inventory

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[14]Only because the opinions well explicate the evidentiary facts, the court is referred to these exemplary cases and the supportive authorities cited therein: United States v. 125.07 Acres Of Land, et., 667 F.2d 243 (1st Cir. 1981); King v. United States, 504 F.2d 1138 (Ct. Cl. 1974); United States ex rel. T.V.A. v. Easement And Right Of Way, 405 F.2d 305 (6th Cir. 1968); United States v. Sowards, 370 F.2d 87 (10th Cir. 1966); United States v. 50 Foot Right Of Way In Bayonne, New Jersey, 337 F.2d 961 (3rd Cir. 1964); United States v. Featherston, 325 F.2d 539 (10th Cir. 1963); United States v. City of Jackville, Arkansas, 257 F.2d 330 (8th Cir. 1958); United States v. 49,375 Square Feet Of Land In Borough of Manhattan, City of New York, 92 F.Supp. 384 (S.D. N.Y. 1050), aff'd. 193 F.2d 180 (2d Cir.) cert. denied, 343 U.S. 928 (1952); Fain v. United States ex rel. T.V.A., 145 F.2d 956 (6th Cir. 1944).

and tools [in a bankruptcy "fraudulent transfer"]);[15] North American Van Lines, Inc. v. Heller, 246 F.Supp. 641 (W.D. La. 1965), aff'd as modified, 371 F.2d 629 (5th Cir. 1967) (household furniture); Ghen v. Rich, 8 Fed. 159 (Mass. 1881) (a fin back whale); Northern Natural Gas Co. v. Grounds, 393 F.Supp. 949 (Kan. 1974) (helium gas); Accord, Rogers v. United States, 332 U.S. 371 (1947). It was also brought to the court's attention

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[15]The court's opinion in this case only notes that part of "the bankrupt's property" "[t]he defendants took over and utilized", for the value of which "the District Court properly allowed [prejudgment] interest", was the bankrupt's "inventory and tools." Id. at 1235. The record in the case demonstrates that as part of the "melding" procedure used to establish the facts in the district court, the trustee in his "narrative" included estimated approximate values for the "inventory and tools", which estimates were made by one of the bankrupt's principals. None of the opposing parties proffered any estimates, so the trustee's estimate was used to establish that part of the damages. That estimated value is, in essence, of course, what would be derived from the more usual "range" of expert opinion testimony, rendering the holding that the damages were sufficiently "ascertainable" a persuasive precedent.

that a bankruptcy case cited in its opinion for another proposition, and not discovered in any of the parties' research on the cross-appeal, In re Christian & Porter Aluminum Co., 584 F.2d 326 (9th Cir. 1978) (R. A-16), also supported the trustee's argument that these damages carried prejudgment interest. It appears from the opinion that there was a "range" of value for the bankrupt's "equipment" between $68,699 and $146,102, and also a difference of opinion on the value of the "inventory" taken over, yet prejudgment interest was allowed--yet another Circuit opinion directly in point and in conflict with the holding in issue here.[16]

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[16]This argument, based solely on conflicting federal common law precedents, accepted the lower court's characterization of the value evidence in this case: that "[t]he evidence as to the value of the transferred property ranged from one million dollars to...$680,000" (R. A-23), thereby leading to the court's conclusion that such "range" of values made the damages not sufficiently ascertainable to bear interest. Actually, as

The lower court's Order denying the petition for rehearing and responding to the trustee's presentation of the unanimous array of contrary authorities is succinct (A-18-A-20, infra), but begets only wonderment--in what it says and in what it does not say. The court maintains that the trustee's "reliance on condemnation cases is inapposite" because in those cases "the main issue is the fair market value of the property...,usually determined by the finder of fact based on the testimony of independent expert witnesses".... whereas here, the evidence

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(Footnote 16 continued)

specified, supra, in the Statement Of The Case, the $680,000 evidence did not constitute a low end of any "range" of the value of the Sullivan Company property at the time of the takeover. It was solely corroborative evidence: that about three-quarters of the customer accounts generated about three-quarters of a million dollars over the subsequent year. The "one million dollar" opinion evidence of the damages at the time of the fraudulent transfer was the only evidence of value, and it was exact--to the dollar--and uncontradicted. There was no "range" in the evidence of value at all.

of value, principally Sullivan's testimony, "was as to the value of the business as a going concern, which was what Watts acquired" (A-18-A-19, infra). Apparently, the lower court would make substantive distinctions between "the condemnation cases" and this case because "fair market value" was there in issue, as opposed to what the court terms "going concern" "value" here, and there were no "independent expert witnesses." Those are chimeras. No authorities are cited in support, and none can be. The court simply constructed non-existent distinctions without any differences to attempt to justify a result contrary to the body of federal common law. The court's opinion speaks only generally of what was being valued, specifying neither "fair market value" nor

"going concern" "value."[17]

The district court opinions also speak only generally to what it was Sullivan was valuing,[18] but its opinion denying the motions for judgments n.o.v. does specifically discuss at length the concept of "going concern value" (R. A-42-R. A-46) correctly viewing it as but " '[a]n additional element of value attache[d] to property considered in the aggregate' "

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[17]The court variously speaks of "the value of Sullivan Company" (R. A-16); "the business was worth" (R. A-16); "the value of the business" (R. A-16); "the value of his property" (R. A-17); "opinion as to value" (R. A-17; R. A-18); "the value of a service company" (R. A-17); "they believed the company to be worth one million dollars" (R. A-20); "the value at the time of transfer" (R. A-20); etc.

[18]Using similar phrases: "the business was worth one million dollars" (R. A-52); "the Sullivan Company was worth" (R. A-53); "the value of that property" (R. A-53); "his opinion as to its value" (R. A-54); "the value of the operational part of D.C. Sullivan" (A-13), etc.

(R. A-42), a related concept to "good-will" value, an aspect of property value in a collective sense "in excess of the sum of the values of the individual resources taken separately." (R. A-42). "Going concern value"-- of theoretical reality--is not what Sullivan said was worth "one million dollars", however. His opinion was specifically elicited, per the defendants' demand and the trial judge's direction, in terms of the "fair market value" of the Sullivan Company, and the jury was charged that "fair market value" was what it had to determine. There is no distinction at all between the "value" in issue in "the condemnation cases" and the "value" in issue here, and the lower court's saying otherwise does not make it so. The other supposed distinction, the absence of "independent expert witnesses" in this case, is no more

real. The court below affirmed the alternative ground for the admissibility of Sullivan's opinion as an " 'expert... under Rule 702'." (R. A-16-R. A-17). No authority can be cited (and none was) to require that only "independent expert witnesses" can testify to the value in issue in a "condemnation case." In fact, it is usually the lay owner's opinion of the property's value that establishes the high end of the "range" of damage. It is a sheer invention of the court below that the evidence of the property damage in any kind of case be a certain kind at all--"opinion", or "expert", or "independent"--but, if there be gradations, Sullivan's and Otte's opinions here speak far more persuasively than the bought and paid for "independent expert": they were defendants, opining directly "against their own interests" (R. A-20, n. 13), as

the court itself pragmatically recognized.

The second basis proffered for the lower court's denial of the petition for rehearing was to now eschew the authority of this Court's opinion in Jones v. United States, 258 U.S. 40 (1922) (which it initially embraced as exemplifying the federal common law of "ascertainable" damages [R. A-23]), because it "is a condemnation case" (A- 19). Even if it were, its authority is not vitiated thereby, but the lower court itself correctly described the nature of the case in its opinion: "a claim that timber land was converted" (R. A-23). It was a common law tort for conversion, not "a condemnation case." It cannot, ex post facto, be transformed. The real "leading case", said the court, is Roth v. Fabrikant Bros., 175 F.2d 665 (2d Cir. 1949), and from it the court erected an apparently new justification to deny prejudgment

interest: that the damages here were not " 'reasonably ascertainable by reference to established market values'." (A-20) The trustee does not dispute that Roth is a "leading case", particularly as it applies the common law "ascertainable" damages rule in a bankruptcy context, but he does dispute the apparent narrow holding the lower court espouses. Referencing the court's use of the phrase "established market values", the court below would, ostensibly, limit "ascertainable" damages to those cases where a "market list", so-called, exists to establish value. That is one way, surely, to prove "ascertainable" damages, but the plethora of cases applying the common law "ascertainable" damages rule--usually holding expert opinion testimony sufficient--are eloquent proof that some kind of previously established market values is not the sine qua non.

In fact, the Roth holding that the "fraudulent transfer" damages were not sufficiently "ascertainable" to bear prejudgment interest was quite different:

> "...there would hardly be a situation where the value of the property transferred was more uncertain than that of the highly speculative items of jewelry involved in the plaintiff's claims." Id. at 669.

The trustee would agree that "highly speculative" damages do not warrant prejudgment interest. A reading of Roth demonstrates that there, quite simply, was a failure of proof at trial, rendering the damages "highly speculative." The defendants' "one million dollars" in this case was quite exact--there was no need to speculate. Roth is no justification to deny prejudgment interest here.

The things not said in the lower court's Order denying the petition for

rehearing need reminder. Even assuming that "condemnation cases" constitute, somehow, an inapposite genre, what of the other conflicting Circuit Court opinions cited to the court (and supra) applying the common law rule to other kinds of property in noncondemnation cases? Ignoring them does not make them go away. The conflicts abide.

It should also be demonstrated that "the condemnation cases" are not a fundamentally irrelevant body of law. They constitute but one kind of application of the common law rule that "ascertainalbe damages" bear prejudgment interest. The damages awarded in those cases are derived from the Fifth Amendment entitlement to "just compensation." United States v. Miller, 317 U.S. 369 (1942), and cases cited therein, and see United States v. 17,280 Acres Of Land, More Or Less,

Situate In Saunders County Nebraska, 57 F.Supp. 745 (Neb. 1944), citing opinions of this Court and other federal cases. To complete the equation, left only is the demonstration that this provision of the Fifth Amendment is but a reflection of the common law. Quoting Blackstone, Storey, and previous decisions of this Court, Mr. Justice Harlan placed that proposition beyond argument in Chicago, B. & O. R. Co. v. City Of Chicago, 166 U.S. 226, 236, 245 (1897):

> "...The [Constitutional] requirement that the property shall not be taken for public use without just compensation is but 'an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down as a principal of universal law.'"
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> * * * * *
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> "...The reason for this rule is that before the establishment of the government of the

> United States it had been the practice in this country and in England to ascertain... the compensation to be made to owners of private property taken for public use." (emphasis supplied.)

Citing one of its opinions relied upon in the previous case, the Court speicifically held, in the leading case of United States v. Rogers, 255 U.S. 163, 169 (1921), that "the allowance of just compensation by giving interest from the time of taking until payment is a convenient and fair method of ascertaining the sum to which the owner of the land is entitled." Similarly, bankruptcy litigation is fundamentally equitable in nature, See, Bank Of Marvin v. England, 385 U.S. 99, 103 (1966), and in cases for the recovery of the value of property "prejudgment interest shall be allowed as part of the compensation awarded to make the injured party

whole." (Emphasis in original) Louisiana & Arkansas Railway Co. v. Expert Drum Co., 359 F.2d 311, 317 (5th Cir. 1966); see, Sharp v. Coopers & Lybrand, 649 F.2d 175, 192-193 (3d Cir. 1981).

There remains the demonstration of the fact, proffered at the outset, supra, that the lower court's opinion is in conflict with every other Circuit, state court opinions, and commentators. The exemplary Court of Appeals cases cited above, and cited below, happen not to include cases from the Fourth, Seventh and Eleventh Circuits. The first two are represented by United States v. 9.88 Acres Of Land, More Or Less, In City Of Hampton, Va., 183 F.Supp. 402 (Va. 1959), affirmed 279 F.2d 890 (4th Cir. 1960), and United States v. 2.4 Acres Of Land, More Or Less, In Lake County, Illinois, 138 F.2d 295 (7th Cir. 1943). The Eleventh Circuit

has not as yet had occasion to address the issue. Two leading commentators also support the trustee's position that the opinion of the court below is truly an aberration, Collier On Bankruptcy, 14th ¶67.49, and McCormick, Handbook On The Law Of Damages, §55, and those authorities collect a regiment of supporting opinions from state courts of last resort.

One can only speculate as to why the respected court below would insist in establishing the unique precedent it has, faced with a solid phalanx of authority to the contrary. Even some rough, Solomon-like purpose evaporates when it is realized that the creditors of D.C. Sullivan & Co., Inc. are entitled to interest on their proven claims under the Bankruptcy Act, if the funds are available, 11 U.S.C. §726(a)(5), and they have had to wait more than 12 years

already. The lower court's holding is most unjust and demonstrably too dangerous to let stand. The matter of fair compensation to citizens, in whatever context it may arise, is as fundamental and as important a right as any other, and it will be jeopardized if this petition is denied. The Court's egregiously crowded calendar need not be further burdened, however. The error is clear enough that summary reversal is warranted. Stern and Gressman, Supreme Court Practice, 5th ed., §5.12.

C O N C L U S I O N

For the reasons stated above, a writ of certiorari should issue to review the specified portion of the judgment and opinion of the United States Court Of

Appeals For The First Circuit entered in this proceeding on July 19, 1982.

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DATED: December 2, 1982

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

ROBERT ROBINSON, Trustee in Bankruptcy of D. C. Sullivan & Co., Inc.,	)	
Plaintiff	)	
V.	)	Civil Action No. 70-1336-N
WATTS DETECTIVE AGENCY, INC., ET AL,	)	
Defendants	)	

ORDER AND MEMORANDUM OF DECISION

NELSON, D.J. September 10, 1980

The trustee in bankruptcy of D.C. Sullivan & Co., Inc., brought this action to recover the value of certain of the bankrupt's assets that were allegedly misappropriated. Named as defendants are Watts Detective Agency, the recipient of the bankrupt's assets, Consolidated Service Corporation, Watts' parent corporation,

Christopher P. Recklitis, the President of both Watts and CSC, and David C. Sullivan and Billy R. Otte, the bankrupt's President and Vice-President. The trustee proceeded against these defendants on three theories of liability: one, they caused the assets of Sullivan Company to be transferred to Watts without fair consideration; two, they caused the transfer to be made with the actual intent to hinder, delay or defraud either existing or future creditors; and three, they unlawfully caused the bankrupt's assets to be diverted to Watts in breach of their fiduciary duty to Sullivan Company. The jury found all five defendants liable under count I, and Sullivan and Otte liable under count III; it further found that the bankrupt had sustained damages in the amount of $750,000. Pursuant to the jury's verdict, judgment was entered.

Before me now is the trustee's motion to alter or amend judgment pursuant

to Rule 59(e) of the Federal Rules of Civil Procedure. The trustee seeks to alter or amend in three respects: one, to include prejudgment interest on the verdict; two, to add Recklitis, Watts and CSC to those whom the jury found liable under count III; and three, to amend the plaintiff's name to Robert Robinson, the successor trustee to Daniel Glosband.

Beginning with the last matter addressed by the trustee's motion, this simply involves a technical error in the judgment and draws no opposition from the defendants. It is obvious that relief should be granted; therefore, the judgment is ordered amended to reflect the name of the person presently serving as trustee of the Sullivan Company.

The first two matters addressed by the trustee's motion may not be dealt with so summarily. Both present substantial questions and involve an effort by the

trustee to obtain prejudgment interest on the jury's verdict from Watts, CSC and Recklitis. For the reasons stated below these motions are denied.

Prejudgment interest is an element of damages; it compensates the plaintiff for the loss of the use of money to which the plaintiff would have been entitled during the course of litigation but for the defendant's wrongful withholding. C. McCormick, Law of Damages, §50 at 205 (1935). See 4 Collier on Bankruptcy, ¶67.49 at 693 & n. 10 (14th ed. 1978). Under each count of his complaint, the trustee included in his prayer for relief a demand for interest. The trustee did not, however, request a jury instruction on interest, and no such instruction was given. Therefore, it is to be presumed that the jury did not pass

on the issue.[1/]

The source of plaintiff's claim determines the governing law of prejudgment interest. If federal law gives rise to the claim, federal law governs the rule of prejudgment interest to be applied. See Royal Indemnity Co. v. United States, 313 U.S. 289, 296 (1941); Furtado v. Bishop, 604 F.2d 80, 97 (1st Cir. 1979) and cases cited. Similarly, if state law is the source of the claim then state law supplies the applicable rule of prejudgment interest. See Glick v. White Motor Co., 458 F.2d 1287, 1294 (3d Cir. 1972). State law does not govern the issue of interest for claims arising under federal law. See Sanabria v.

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[1]There is of course no way of knowing whether the jury considered the issue of interest even in the absence of an instruction. The cases nonetheless presume that if the question of prejudgment interest was not specifically submitted to the jury, the jury gave the issue no consideration in evaluating the damages suffered by the plaintiff. See Furtado v. Bishop, 604 F.2d 80, 98 (1st Cir. 1979); Newburgh Land & Dock Co. v. Texas Co., 227 F.2d 732, 735 (2d Cir. 1955).

International Longshoremen's Ass'n Local 1575, 597 F.2d 312, 313-14 (1st Cir. 1979); Moore-McCormack Lines, Inc. v. Amirault, 202 F.2d 893, 894-897 (1st Cir. 1953).

There is no dispute over whether the trustee is entitled to interest on the judgment obtained on count III. Count III arises under Massachusetts state law. The governing state law provides by statute that the clerk of court is to add prejudgment interest to all damage judgments in tort actions. Mass. Gen. Laws Ann. ch. 231, §6B (West. Supp. 1979)[2/]

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[2] Chapter 231, §6B currently provides:

In any action in which a verdict is rendered or a finding made or an order for judgment made for pecuniary damages for personal injuries to the plaintiff or for consequential damages, or for damage to property, there shall be added by the clerk of the court to the amount of damages interest thereon at the rate of eight per cent per annum from the date of commencement of the action even though such interest brings the amount of the verdict of finding beyond the maximum liability imposed by law.

The award of interest under Massachusetts Law is a ministerial function; chapter 231, §6B leaves no discretion with either the judge or jury. Inasmuch as the judgment on count III does not include an award of interest, the judgment is in error and may be amended.

The parties do dispute whether interest is due on count I. In count I of his complaint, the trustee states a cause of action arising under the federal bankruptcy laws. Consequently, federal law governs the availability of prejudgment interest. Unlike the general laws of Massachusetts,

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(Footnote 2 continued)

The current version of §6B is the result of an amendment enacted in 1974. Before the amendment the statutory rate of interest was 6%. The Supreme Judicial Court has held that that amendment does not apply retroactively. Peter v. Clerk of the Superior Court, 368 Mass. 116 (1975). Accordingly, for the prejudgment period occurring before August 14, 1974, the effective date of the amendment, a successful claimant is entitled to interest only at the old rate. For the period after August 14, 1974, the claimant is entitled to interest at the current rate.

the United States Code does not contain a general statute granting prejudgment interest. Compare 28 USC §1961 (post-judgment interest). Moreover, the applicable bankruptcy laws do not address the question. Whether the trustee may recover prejudgment interest depends therefore on federal common law.

The general common law rule is that prejudgment interest is mandatory whenever the principal damages sought are liquidated or ascertainable with reasonable certainty. Roth v. Fabrikant Bros., 175 F.2d 665, 669 (2d Cir. 1949). See Furtado v. Bishop, 604 F.2d 80, 97 (1st Cir. 1979). See generally C. McCormick, Handbook on the Law of Damages, §§54 & 55 (1935). Damages are liquidated when they are fixed and known. See C. McCormick, supra at 213. Damages are ascertainable with reasonable certainty when "the amount to be awarded, when all the concrete facts are ascertained, depends only upon the judge or jury's opinion in

the light of the evidence, as to the pecuniary value, ascertained by market prices or current standards of property or services" (emphasis in original). Id. at 217. See Jones v. United States, 258 U.S. 40, 49 (1922) (land converted by fraud may have a definite or ascertainable value); Palmer v. Radio Corp. of America, 453 F.2d 1133, 1140 (8th Cir. 1971) (sum of money paid by bankrupt in satisfaction of an antecedent debt was sufficiently certain). Damages are not ascertainable with reasonable certainty when "[j]udicious men would be likely to give upon the same evidence quite different estimates of the proper amount of damages to be allowed." C. McCormick, supra at 222. See Roth v. Fabrikant Bros., supra (value of jewelry fraudulently transferred was highly speculative).

When damages are neither liquidated nor ascertainable with reasonable certainty

then prejudgment interest may yet be available as a matter of discretion. See C. McCormick, supra at §56. See also Robinson v. Pocahontas, Inc., 477 F.2d 1048 (1st Cir. 1973) (award of interest in maritime case for personal injuries is discretionary). In this Circuit, as elsewhere, if the award of interest rests in discretion, it is the jury that must exercise it. Robinson v. Pocahontas, Inc., supra at 1053, citing Newburgh Land & Dock Co. v. Texas Co., 227 F.2d 732, 735 (2d Cir. 1955). See Scola v. Boat Frances, R., Inc., 618 F.2d 147, 153 (1st Cir. 1980); Furtado v. Bishop, 604 F.2d at 98. The apparent rationale underlying this rule is that when the amount of damages is uncertain, the jury should decide whether interest is necessary to compensate the plaintiff adequately. If in such a case the court does not instruct the jury on interest, and the plaintiff fails to object, then the plaintiff has waived his right to have the jury

consider the issue. Furtado v. Bishop, supra; Robinson v. Pocahontas, Inc., supra; Newburgh Land & Dock Co., v. Texas Co., supra. See Fed. R. Civ. P. 51.

The plaintiff here seems to suggest that the common law rule on interest, as described above, does not apply in the bankruptcy setting--that instead the certainty of damages is irrelevant and interest is simply mandatory. I find no support for this position. A leading case on the issue of prejudgment interest is Roth v. Fabrikant Bros., 175 F.2d 665 (2d Cir. 1949). There the court recited the common law rule as presented here and applied it to award interest on a voidable preference claim for which damages were certain and to deny interest on a fraudulent transfer claim for which damages were speculative. This case, cited favorable in this Circuit, see Moore-McCormack Linen, Inc., v. Amirault, 202 F.2d

893, 897 (1st Cir. 1953), establishes the applicability of the general rule to bankruptcy cases. See also Palmer v. Radio Corp. of America, 453 F.2d 1133 (5th Cir. 1971).

In addition, none of the cases cited by the plaintiff establishes either the inapplicability of the rule or that interest is mandatory. Each of the federal cases cited involves a loss that although unliquidated was certain.[3/] Interest was due as a right in those cases not because of the bankruptcy setting but rather because the damages were ascertainable with reasonable certainty. As for the state cases

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[3] Kaufman v. Tredway, 195 U.S. 271 (1904); Kass v. Doyle, 275 F.2d 258 (2d Cir. 1960); Salter v. Guaranty Trust Co., 237 F.2d 446 (1st Cir. 1956); Manufacturers' Finance Co. v. Marks, 142 F.2d 521 (6th Cir.) cert. denied, 323 U.S. 721 (1944); Plymouth County Trust Co. v. MacDonald, 60 F.2d 94 (1st Cir. 1932); Levy v. Weinberg & Holman, 20 F.2d 565 (2d Cir. 1927); Elliotte v. American Savings Bank & Trust Co., 18 F.2d 460 (6th Cir. 1927); Gould v. Nathans, 1F.2d 458 (1st Cir. 1924).

cited, they also involve sums that were readily ascertainable.[4/] In addition, all were tried to a master, who made findings as to damages and awarded interest. There was thus no need for the appellate courts to consider whether, in awarding interest, the master was acting in a ministerial or discretionary capacity. In conclusion, the cases cited by the plaintiff do not persuade me that a rule other than the general common law rule applies here. I therefore turn to the application of the general rule to the cases before me.

In bringing this action, the trustee sought to recover as damages the value of the operational part of D.C. Sullivan and

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[4] Citizens Bank & Trust Co. v. Rockingham Trailer Sales, Inc., 351 Mass. 457 (1966); Buckley v. John, 314 Mass. 719 ((1943); R. E. McDonald Co. v. Finkovitch, 270 Mass. 362 (1930); Lemak v. Feffer-Simon, 268 Mass. 156 (1929); Goldstein v. Simon Manufacturing Company, 237 Mass. 97 (1921).

Company--essentially, the value of the bankrupt's employees, customers and service knowledge.

At trial, there was no evidence that the trustee's damages were liquidated. There was and there is no agreement among the parties as to the value of what the defendants obtained, nor had the assets of the Sullivan Company been reduced to cash. Further, there was no evidence of a market listing for service businesses so that the jury might determine value by reference to established prices. Instead, the evidence submitted gave the jury wide latitude to formulate a damage award. For that reason, I conclude that damages were neither liquidated nor ascertainable with reasonable certainty and that therefore the award of prejudgment interest was available by permission of the jury only. Since I did not instruct on the issue and the trustee

did not object or ask for a curative instruction, the trustee now has no right to have the damages awarded under count I supplemented. The trustee's motion to alter or amend with respect to that count is denied.

As stated above, interest is available by right on the judgment under count III. The trustee can therefore yet obtain a judgment of $750,000 plus prejudgment interest against all defendants, if all defendants are deemed liable under that count. The jury of course did not find Watts, CSC or Recklitis liable under count III, which leads to the last element of relief that the trustee seeks under his motion to alter or amend.

The trustee argues, that on the evidence, it was impossible for the jury not to have found all the defendants liable under count III. The trustee therefore moves that Watts, CSC and Recklitis be

added to the judgment on that count.

The trustee likens the relief he seeks on count III to the relief commonly sought by a motion for a judgment non obstante verdicto. See Fed. R. Civ. P. 50(b). The analogy is sound, given that in both instances a court would have to re-examine the jury's findings of fact. Rule 59(e) does not, however, permit the court to conduct such a re-examination. 6A Moore's Federal Practice ¶59.12[1] at 59-250 & n. 38 (2d ed. 1979). I find nothing in the one case cited by the trustee on this point[5] that persuades me either that the relief he seeks would not require a re-examination of the facts or that such a re-examination is permissible under Rule 59(e). I therefore conclude that the relief the trustee seeks with respect to count III is unavailable through Rule 59(e).

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[5] Page v. New England Telephone and Telegraph Co., 403 N.E. 2d 1201 (Mass. App. 1980).

For the reasons stated above, it is ORDERED that the judgment entered in this case be and hereby is amended by changing the name of the plaintiff from Daniel Glosband to Robert Robinson, the trustee in bankruptcy, and by adding prejudgment interest on count III. All other relief sought by the trustee under Rule 59(e) is DENIED.

David S. Nelson
David S. Nelson
United States
District Judge

ORDER OF COURT

Entered September 14, 1982

The petition of the trustee-appellee for rehearing is denied.

We think the appellee's reliance on condemnation cases is inapposite. In such cases there has been a taking by the government and the main issue is the fair market value of the property (usually real estate) at the time of the taking. The fair market value is, in most condemnation cases, determined by the finder of fact based on the testimony of independent expert witnesses. Here, there was no testimony by independent expert witnesses of the fair market value of the assets transferred to Watts. The principal evidence as to the value of the business came from Sullivan and his testimony, which

we held was properly admitted, was as to the value of the business as a going concern, which was what Watts acquired. See slip op. at 9. While such evidence was sufficient to make the question of value on which a jury could decide, it does not compel the conclusion that the district court erred in ruling that the damages were not ascertainable before trial with reasonable certainty. See slip op. at 24.

The leading case on the question of prejudgment interest is not, as appellee asserts, Jones v. United States, 258 U.S. 40 (1922), which is a condemnation case, but, as we stated in our opinion at page 22, is Roth v. Fabrikant Bros., 175 F.2d 665 (2d Cir. 1949), which involved a viodable preference and a fraudulent transfer under the Bankruptcy Act. Augustus Hand's ruling applies directly to the case at bar: "In our opinion, the recoveries allowed in the

verdict for fraudulent transfers should not bear interest, for the amount of those claims were neither liquidated nor reasonably ascertainable by reference to establish market values." Id. at 669.

By the Court:

/s/ Dana H. Gallup
Clerk

Mr. David Edgar, called as a witness (page 139 of testimony), testified that he lived about 20 miles from Portland; had lived in the vicinity of Portland since 1901 and prior to that in Alaska; had been a timber cruiser for about 30 years, doing cruising out of Portland in the States of Oregon, California and Washington; that he had cruised lands in Lincoln County, Oregon, in the fall of 1901 and 1902; that he had cruised Townships 8S and 8-9 (meaning Twps. 8 S., R. 8 W., and 8 S., R. 9 W.); that he was acquainted with the kind and quality of timber in those townships at that time. The following question was propounded by counsel for plaintiff (page 140 of testimony):

"Q. Are you acquainted with what the timber was buying for at that time?"

To which question counsel for defendant objected as being incompetent and immaterial, and not shown to be in the vicinity of the land in question. Which objection was overruled by the court, to which ruling counsel for defendant saved an exception and exception allowed.

Witness was then permitted, over the objection of defendant, to testify as follows:

"Q. What was the timber buying for at that time in that location?

A. Well, it bought for about—the lowest was $1000 for any claim that I know of.

Q. You mean $1000 for a quarter section?

A. For a quarter section.

Q. For 160 acres?

A. Yes. And the highest the highest claim I know of sold for $1500.00. That was later on, you know, some time after that.

Q. What did claims l ay for in 1902? What was the lowest?

A. I heard of some being sold there for $1000.00.

Q. And what did it range up to? Did it go up?

A. It went up from there; about $2500.00 was the highest then, I think.

Q. What was the average claim there?

A. I don't think it was over $1500.00—$1600.00.

Q. $1600.00 a claim?

A. I don't think it was over that.

Q. Now do you know what the price of timber, the buying of timber would run?

A. No, I don't.

Q. Stumpage?

A. No, I don't know.

Q. The price per thousand, do you know?

A. Oh, I couldn't tell you, you know. There was no—

Q. What was it buying for at that time, do you know?

A. I didn't know of any being sold at that time."

Mr. W. H. Stennick, called as a witness on behalf of plaintiff (page 119 of testimony), testified

that he had lived in Portland most of the time since 1900; that his business was a timber estimater or cruiser; that he had cruised timber in Lincoln County first in 1902 and up to about 1912.

The following question was propounded by counsel for plaintiff (page 150):

"Q. Did you ever cruise any timber on the Siletz Reservation?

A. Yes, sir.

Q. Are you acquainted with the quality and kind of timber growing on the claims in the Siletz Reservation?

A. Yes, sir.

Q. What would you say as to what timber was buying and selling for in about 1902 in that locality?

A. I couldn't answer that question.

Court: Did you say you couldn't answer that question?

A. Yes, sir.

Q. Were'nt you cruising timber about that time?

A. Some; yes, sir.

Q. In 1902?

A. Yes, sir; but I was not buying or selling.

Q. Well, do you know what it was being bought and sold for?

A. Just from hearsay.

Q. Well, that is all we ask you. We didn't ex

pect you to be buying. What was it buying and selling for in 1902?"

Question was objected to as incompetent and immaterial. Which objection was overruled by the court, to which ruling counsel for defendant excepted and an exception allowed.

"Court: He answered about $1000 a claim, from what he heard. Do you object to that question?

Mr. Hall: I object to his testifying unless he located it at or near where these lands are.

Court: He says it is on the Siletz Reservation.

Mr. Hall: The Siletz Reservation is a large body of land, your Honor.

Q. Do you remember what townships you cruised in?

A. In 1902 I was in 8-9 (meaning Twp. 8 S., R. 9 W.).

Mr. Goldstein: That is close enough.

Q. Do you know what it was buying or selling for per thousand feet?

A. No, sir.

Q. You just merely stated it was about an average of a thousand dollars per claim?

A. Yes, sir.

Q. Is that irrespective of stumpage?

A. I think so.

Q. How much stumpage would be on a $1000 claim, in average?

A. I couldn't answer that question."

Plaintiff called as a witness B. H. Howell (page 453 of testimony), who testified that he lived at Toledo, Oregon; that he had been County Clerk of said county for 8 years; had lived in Lincoln County ever since it was a county and it was created in 1893; that he had been over the Siletz Indian Reservation and knew the geography of the country fairly well; he had never been in the hills but had been up and down the river.

The following question was propounded by counsel for plaintiff:

"Q. Do you know what the timber land in the Siletz Reservation was being bought and sold for in 1902?

A. Well, it would only be hearsay.

Q. Well, that is all we ask for.

A. Yes.

Q. Now, what was a claim of 160 acres, a quarter section, of timber land on the Siletz Reservation being bought and sold for in 1902?"

Which question was objected to by counsel for defendant as incompetent and hearsay. Which objection was overruled by the court, to which ruling counsel for defendant excepted and an exception allowed.

Witness thereupon answered:

"A. Anything up to about $1000 or $1200.

Court: A claim?

A. Yes, sir.

Court: 160 acres?

A. Yes, sir."

At the close of all of plaintiff's testimony in chief, and after plaintiff had rested its case, defendant, by its counsel, moved the court for a judgment of nonsuit for the reason that plaintiff had failed to prove such a case as is entitled to take the case to the jury, which motion was by the court overruled, to which ruling counsel for defendant excepted, and an exception allowed.

At the close of all of the testimony given in the case, and after plaintiff and defendant had each rested, the defendant by his counsel moved the court for an order directing the jury to return a verdict in favor of the defendant, which motion was overruled by the court, to which ruling counsel for defendant duly excepted and an exception allowed by the court.

Prior to the first argument to the jury, counsel for defendant requested the court in writing to give to the jury the following instruction hereinafter set forth:

"The complaint charges in effect that defendant Jones, with a view and intention of acquiring title in himself to the lands here in question, caused the same to be cruised, and, designing and intending to deceive the officers of the United States and cheat it out of the